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IN THE
COURT OF APPEALS OF INDIANA

DANIEL FARABEE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0602-CR-118
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0502-FC-17242

January 17, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Daniel Farabee ("Farabee") was convicted in Marion Superior Court of Class C felony welfare fraud. He was sentenced to a term of four years executed and ordered to pay restitution in the amount of $22,918. Farabee appeals his sentence arguing that the trial court failed to consider a mitigating circumstance and that his four-year sentence is inappropriate. Concluding that Farabee was appropriately sentenced, we affirm.

Facts and Procedural History

In 1999, Farabee and Melissa Gilbert ("Gilbert") purchased a home located at 1108 North Warman Avenue in Indianapolis. In the fall of 2001, Gilbert completed an application for Section Eight housing requesting assistance with a $600 rent payment for that property. Farabee was listed as her landlord on the application. The Indianapolis Housing Agency entered into a housing assistance payment contract with Gilbert in December 2001. Pursuant to the contract, Farabee was required to certify that Gilbert had no ownership interest in the property. Moreover, if Gilbert later acquired such an interest, Farabee was required to disclose her interest to the Housing Agency. Gilbert's contract with the Housing Agency was extended in 2002 and 2003.

In 2004, the Housing Agency received an email alleging fraud concerning the Warman Avenue property and began an investigation. The investigating officer discovered that Farabee and Gilbert had purchased the property in 1999 and had taken a subsequent mortgage out on the property in 2004.[1] As a result, both Farabee and Gilbert

[1] Gilbert attempted to dispose of her interest in the property by executing a quitclaim deed in 2001. However, the deed was not valid because the legal description of the property was incorrect. Tr. p. 112. Gilbert testified that she discovered the deed was invalid prior to executing the 2004 mortgage documents. Tr. pp. 113-14.

were charged with Class C felony welfare fraud and Class D felony theft. Specifically, Farabee was charged as follows:

> Daniel Farabee, on or about between January 01, 2002 and December 31, 2004, did knowingly obtain public relief or assistance, that is: Section 8 Housing payments, in an amount more than two thousand five hundred dollars ($2,500), by means of false or misleading oral or written statements to the Indianapolis Housing Agency or by concealing information from the Indianapolis Housing Agency for the purpose of receiving public relief or assistance to which he was not entitled, that is: failing to disclose that he jointing [sic] owned the Section 8 rental property at 1008 North Warman Avenue with his Section 8 tenant and/or failing to disclose that he was living in the Section 8 rental property at 1108 North Warman Avenue, a property for which he was receiving Section 8 payments.

Appellant's App. p. 27.

On October 3, 2005, a bench trial was held. Both Farabee and Gilbert were found guilty of Class C felony welfare fraud, but not guilty of theft. At the sentencing hearing, the trial court found that Farabee's criminal history consisting of three prior felony convictions outweighed the mitigating circumstances of Farabee's remorse, poor health, and "the letters of good character sent by your friends." Tr. p. 179. Farabee was then sentenced to serve four years executed and ordered to pay restitution in the amount of $22,918.[2] The trial court also stated that it would revisit Farabee's placement in the Department of Correction if he had a clear conduct record after one year. Farabee now appeals.

Discussion and Decision

Sentencing determinations are within the discretion of the trial court. Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004). "When a trial court finds aggravating or mitigating circumstances, it must make a statement of its reasons for selecting the

[2] Gilbert was sentenced to two years and that sentence was suspended to probation.

sentence imposed." Frey v. State, 841 N.E.2d 231, 234 (Ind. Ct. App. 2006). Yet, the trial court need not set forth its reasons when imposing the presumptive sentence. Id. However, if the trial court finds aggravating and mitigating circumstances, concludes they balance, and imposes the presumptive sentence, then pursuant to Indiana Code section 35-38-1-3, the trial court must provide a statement of its reasons for imposing the presumptive sentence. Id.

Furthermore, when a defendant offers evidence of mitigating circumstances, the trial court has discretion to determine whether the circumstances are mitigating, and the trial court is not required to explain why it does not find the proffered circumstances to be mitigating. Stout v. State, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), trans. denied. The trial court is not required to give the same weight as the defendant does to mitigating evidence. Frey, 841 N.E.2d at 234. An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied. Moreover, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. Id.

Farabee contends that the evidence presented demonstrates his "limited awareness that his actions constituted criminal behavior, at least when the conduct for which he was charged began," and the trial court should have assigned mitigating weight to this circumstance during sentencing. Br. of Appellant at 8. However, Farabee did not argue this mitigating circumstance during the sentencing hearing. Therefore, he has waived this

argument on appeal.[3] See Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (The defendant's failure to raise a proposed mitigating circumstance at sentencing precludes him from raising it for the first time upon appeal.).

Farabee also asserts that his four-year sentence is inappropriate. Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B) (2005); Marshall v. State, 832 N.E.2d 615, 624 (Ind. Ct. App. 2005), trans. denied.

On the date Farabee committed this offense, the presumptive sentence for a Class C felony was four years.[4] Ind. Code § 35-50-2-6 (2004 & Supp. 2006). The trial court found that the aggravating circumstance of Farabee's criminal history outweighed the mitigating circumstances, yet only imposed the presumptive four-year sentence.

Concerning the character of the offender, Farabee has three prior felony convictions: a 1976 theft conviction, a 1980 theft conviction, and a 1995 conviction for failure to stop at an accident which resulted in the death of a pedestrian. With regard to the nature of the offense, we observe that Farabee defrauded the State of Indiana in the amount of $22,918. Accordingly, we conclude that Farabee's presumptive four-year sentence is appropriate in light of the nature of the offense and the character of the offender.

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[3] Waiver notwithstanding, we observe that Farabee has not challenged the sufficiency of the evidence in this appeal. He was charged and convicted of "knowingly" committing welfare fraud. Therefore, we cannot agree with Farabee's argument that his alleged "limited awareness that his actions constituted criminal behavior" should be considered as a mitigating circumstance.

[4] In 2005, in response to Blakely v. Washington, 542 U.S. 296 (2004), our General Assembly amended the sentencing statutes to provide for advisory rather than presumptive sentences. Because Farabee's crime occurred prior to the enactment of those new statutes, we apply the prior version. See Creekmore v. State, 853 N.E.2d 523, 528-29 (Ind. Ct. App. 2006).

Affirmed.

KIRSCH, C. J., and SHARPNACK, J., concur.